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Statutory Pre-Emption Right as Changed by the New Civil Code

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Abstract

The right of pre-emption can be characterized as a legal relationship following either statutory or contractual provisions, that establishes rights and obligations between the entitled person (eligible person) and the obliged person (owner) as two parties to the relationship. The content of this relationship is first of all the legitimate right of the eligible person to be offered by the obliged person to buy a particular thing and the corresponding obligation of the owner to offer the thing if it shall be sold. The purpose of the pre-emption right is to secure a priority status of the eligible person as regards the potential acquisition of the subject of pre-emption right. The pre-emptive right may be established in particular through rules provided directly by the law. The law may establish pre-emption rights in various situations. Most often it is the right of co-owners by shares to buy the share or shares offered for sale by other co-owners. This right was dominating to the relationship of the co-owners by share until the entry into force of the Civil Code No. 89/ 2012 Coll . as part of a general regulation of co-ownership. Its infringement brought along relative nullity of the legal act on the transfer of the ownership share.

This paper deals with two question connected to the pre-emption right that have been subject to modifications on the basis of the entry into force of the new Civil Code , Act . No. 89/2012 Coll . by 1 January 2014. First of all, it analyses the narrowed scope of the statutory pre-emption rights of co-owners by shares and its possible impact on their mutual relations in practice. Subsequently, the paper focuses on the conceptual change of the relative nullity of the transfer of property carried out in violation of the statutory pre-emption right and the procedural consequences thereof .

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1. Introduction

The pre-emption right can be characterized as a legal relationship between the person entitled from the pre-emption right (eligible person) and the person liable by this right (liable person). The content of this relationship is in particular the right of the eligible person to be compulsorily offered to buy a thing (property) if the owner – liable wants to dispose with the property. To this right corresponds the obligation of the liable person. The purpose of the above right is to secure priority to the eligible person as regards the acquisition of the property-subject of the pre-emption right. However, this acquisition does not occur automatically, it is dependent on manifestation of will by both parties to the relationship. The first prerequisite is the will of the liable person to dispose with the property, the second one is the will of the eligible person to acquire the property.

According to the legal effects we can distinguish between two types of the pre-emption rights, namely the right of first refusal vested in a person (contractual right of first refusal) and substantive right of first refusal (pre-emption right arising under the statutes). In the case of the contractual pre-emption right only the parties to the contract are committed and/or entitled, whereas under the substantive right of first refusal the obligation to offer the property for the purchase commits not only the persons that concluded a contract but every person in the legal position of the co-owner.

The pre-emptive right may arise primarily from reasons set directly by the statute. Statutes may establish the pre-emption right in various situations. Most frequently it is the right of co-owner by share to buy the share/shares of other co-owners. Prior to the entry into force of the Civil Code No. 89/2012 Coll. (“CivC” thereafter) this right formed part of a general system of rules for co-ownership by shares and its infringement lead to the relative nullity of the legal transaction that transferred the co-ownership share (cf. Section 140 of Civil Code No. 60/1964 Coll., as amended – “CivC 1964” thereafter)[†].

In addition, the law stipulates for the right of first refusal with other persons as eligible persons in the form of the so called bid obligation. For example, under Act No. 20/1987 Coll. on the state conservation, owners of cultural monuments are required – if they intent to sell such cultural monuments – to offer them preferably to the district authority competent according to the place of residence of the owner.

Another example is the regulation for bid obligation imposed on owners of undeveloped land, located on the territory of national parks, national nature reservations or natural monuments. Act No. 114/1992 Coll. on nature and landscape preservation provides for these owners the obligation to offer at the time of the intended sale of the land in question to its purchase by the nature conservation authority.

Finally, we can quote the provisions of Act No. 503/2012 Coll. on the State Land Office, under which the owners of agricultural land who have acquired these from the State earlier than 5 years ago, must in the case they want to resell the land offer it first to the State, this for the same price as they bought it earlier from the State[‡].

2. Material and Methods

The new Civil Code implemented one fundamental change in the existing rules governing the statutory pre-emption right. The aim of this contribution is to analyze the reasons that led the law-makers to this change and the consequences to that it may lead. With the use of comparative methods – regarding the previous statutory regulation – we will compare the advantages and disadvantages of the statutory pre-emption right and will be drawn from this comparison the potential influence they may have on the legal practice. We will also consider the tasks it will pose on the decision-making process of the courts from the viewpoint of potential disputes and their settlement. Special attention will be paid in this context to the relative nullity of legal acts, which may occur if the pre-emption right of the co-owners is not implemented in the case of selling of the co-ownership share by one of the co-owners.

[†] For more details and argumentations see Janku, M.(2013),

[‡] This regulation of the statutory pre-emption of the State is a very restricted form of pre-emption, that applied pursuant to Act No. 95/1995 Coll., on conditions for the transfer of agricultural and forest lands from State ownership to another person. The original extend of the right contained no time limits for the offering bid for all State land, with the exception of the persons entitled acc. to so called restitution acts. The Act was repealed by the Act. No. 203/2012 Coll. with effect from 1.1.2013

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